



POLICE DEPARTMENT CITY OF NEW YORK

December 15, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Eduardo Perez-Romero
Tax Registry No. 940571
42 Precinct
Disciplinary Case No. 2015-14319

Charges and Specifications:

1. Said Police Officer Eduardo Perezromero, on or about March 8, 2015, at approximately 0431 hours, while assigned to the 42nd Precinct and on duty, in the vicinity of [REDACTED] Bronx County, did wrongfully use force against Individual 1 in that he repeatedly struck Individual 1 in the face with a closed fist.

P.G. 203-11 – USE OF FORCE

Appearances:

For the CCRB: Jonathan Darche, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent: Craig R. Hayes, Esq.
Worth, Longworth & London LLP
111 John Street, Suite 640
New York, NY 10038

Hearing Dates:

July 14 and August 24, 2016

Decision:

Guilty

Trial Commissioner:

ADCT David S. Weisel

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on July 14 and August 24, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The CCRB called Andrew Estick as a witness. Respondent called Police Officer John Moise as a witness and Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, the Court finds Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

It is undisputed that the complainant in this matter, Individual 1 [REDACTED] [REDACTED], engaged in a verbal dispute with Andrew Estick outside [REDACTED] in the Bronx on March 8, 2015, at approximately 0400 hours. It is also not contested that Individual 1 had a kitchen knife in his pocket and that Estick called for police assistance. Upon the arrival of Police Officers Gregory Tomassi and Kevin Istorico, Individual 1 refused to leave the location and then resisted arrest by stiffening his body and refusing to give up his hands. Respondent and his partner, Police Officer John Moise, who were assigned to the conditions unit, arrived at the scene in a black unmarked Chevrolet Impala as back-up. Multiple other sectors also responded. Individual 1 was taken to the ground, handcuffed and placed in Respondent and Moise's unmarked vehicle. The vehicle lacked a partition so Respondent rode in the backseat with Individual 1 who was not wearing a seatbelt. Upon arrival at the stationhouse, it was noted that Individual 1 had sustained injuries to his face and paramedics were called (see CCRB Ex. 4, arrest photograph).

Individual 1 was taken to the hospital, where it was noted upon admission that there were multiple abrasions and lacerations to his face, specifically a 2-centimeter horizontal laceration to his right upper eyebrow, a 1 cm horizontal laceration to his left upper eyebrow and a 1 cm by 1

cm abrasion to his left forehead. Facial swelling also was noted. Individual 1 told medical personnel that he was assaulted by the police and was punched in the face. A CT scan of his facial bones revealed that he fractured his left inferior orbital floor and rim. The fracture was described in progress notes as "mildly displaced." His nasal bones were described as "intact." Scans of his brain and spine were negative for acute injuries. Individual 1 was discharged late in the evening on March 9, 2015 (CCRB Ex. 6, medical records).

What is in dispute is how Individual 1 was injured. The CCRB alleged that Individual 1 was injured when Respondent, while next to him in the backseat, punched him repeatedly in the face. Respondent and Moise indicated that Individual 1 injured himself by banging his head against the door of the police vehicle.

Andrew Estick, whose argument with Individual 1 was the impetus for the police response, testified that he was accompanying his friend Individual 2 back to her home on the night in question. Individual 2 apparently was or had been Individual 1's girlfriend at some time. Estick alleged that on that night, Individual 1 slashed his tires and "sway[ed]" a bottle toward him in a threatening manner before leaving the location. A short time later, Estick testified, Individual 1 returned, asking Estick about the nature of his relationship with Individual 2 and threatening to stab him with a kitchen knife. Fearing for his safety, Estick convinced Individual 1 to step outside and then called police. Estick described as Individual 1 as loud and possibly intoxicated (Tr. 17-23, 34).

When a marked police car arrived, Estick approached and pointed out Individual 1. He recalled that Individual 1 refused to leave the location and both officers attempted to restrain Individual 1 by grabbing his arm. Estick heard the officers direct Individual 1 to stop resisting, but he did not comply and was "motioning, tussling, trying to get away." Estick testified that ultimately, Individual 1 fell face-first to the sidewalk, taking the officers down on top of him. They lifted him against a dumpster, where he continued to try to break away. Several police vehicles, he recalled, had responded by this

point. With that assistance, Individual 1 was taken to the ground again, face-down, and handcuffed. Estick noted, however, that officers did not slam Individual 1 to the ground. He stated that the left side of Individual 1's face was on the ground but clarified it did not "hit the ground." As Estick departed, the officers walked Individual 1 to the vehicle. He testified that he looked Individual 1 in the eye, from a few feet away, and that his face was "fine" and "normal" (Tr. 28-33, 38-40, 42-49).

Individual 1 did not appear at trial. The CCRB's efforts to contact him, both through his attorney in his civil lawsuit and service of process, ultimately were unsuccessful (Tr. 11-13). Transcripts from interviews that Individual 1 had with IAB immediately following the incident on March 10, 2015 (CCRB Ex. 1), and a follow-up interview from June 7, 2015 (CCRB Ex. 2), were entered into evidence along with his April 6, 2015, interview with the CCRB (CCRB Ex. 3). A transcript of Individual 1's February 22, 2016, hearing pursuant to General Municipal Law § 50-h relating to his civil lawsuit was entered into evidence as Court Exhibit 1 (CX 1).

At all three of his IAB and CCRB interviews, Individual 1 admitted arguing with Estick about Individual 2. He conceded that he was "acting up" and that he had been drinking. He also admitted having a kitchen knife in his pocket, which he said he willing and immediately handed over to the first two responding officers (Ex. 1, pp. 3-4, 12; Ex. 2, p. 3; Ex. 3, pp. 3-5, 14).

Individual 1 contended that he was calm in speaking with the officers initially but began questioning them when they told him he had to leave the location. A two-to-three minute struggle ensued, where Individual 1 admitted he resisted arrest by stiffening his body and refusing to give the officers his hands. During this time, several other officers arrived on the scene. Individual 1 was taken to the ground, where he was handcuffed, but he stated that he sustained no injuries during this altercation. He had no complaint about how these officers behaved, even pointing out "it was their job." He further noted that his face did not hit the ground (Ex. 2, pp. 5-10; Ex. 3, pp. 4, 10, 16-23).

Individual 1 asserted in his first interview with IAB that when he was placed in the backseat of an unmarked Impala, a Hispanic, uniformed officer he had never seen before entered the backseat and “kept on pounding him,” punching him in the face repeatedly for the entirety of the five-minute drive back to the precinct. At subsequent interviews, Individual 1 insisted that he was behaving “perfectly normal” while in the vehicle and had given up resisting as soon as he was handcuffed (Ex. 1, pp. 5-6, 9; Ex. 2, pp. 14-15; Ex. 3, pp. 5, 27-28).

Individual 1 alleged in the subsequent interviews that this officer pushed him to the floor of the vehicle, between the seats, so that he could not move. He estimated that he was punched over 100 times, re-stating this to 50 to 100 times, and asserted that all of his injuries were the result of the impact of the punches. Individual 1 contended that the driver did not turn around or speak while he was being beaten (Ex. 2, pp. 13-17, 24-25; Ex. 3, pp. 28-34).

Individual 1 was somewhat inconsistent in these interviews as to his interaction with the officer prior to the alleged assault in the backseat. At his first IAB interview, he said that he never saw the officer that punched him in the backseat, before or after the beating (Ex. 1, pp. 5, 10). A month later at his CCRB interview, however, Individual 1 suggested the officer in the backseat was the “arresting officer” that had previously spoken to Estick at the scene (Ex. 3, pp. 24-25). In a subsequent conversation with IAB three months after the incident, Individual 1 stated that the “Spanish officer who was struggling with me jumped in the backseat” (Ex. 2, pp. 12-13).

At Individual 1’s 2016 50-h hearing, he provided a markedly different account of events. In a complete departure from his earlier accounts, Individual 1 alleged that after he gave the responding officers the knife, they grabbed him and began hitting him in the head, continuing to do so for four minutes. He noted that Estick was just ten feet away while this was happening. Individual 1 contended that, though he did not fight back or resist, he was then “slammed” to the ground and handcuffed. He stated that he was then beaten in the back seat of a black Impala for ten to

fifteen minutes, causing him to lose consciousness, something he had not recounted previously, and bleed "all over." Individual 1 alleged that one of his ribs was also fractured in addition to the orbital fracture and abrasions. He recalled having eight stitches on the right side of his face and ten on the left side. He stated he was charged with possession of the knife and resisting arrest but the charges were dismissed (CX 1, pp. 12-13, 15-17, 20-23, 26-28, 31).

Respondent's partner on the night of the incident, Police Officer John Moise, also testified. He recalled that at 0430 hours, they received a call for an officer needing assistance. There was a "lot of yelling" on the radio. Arriving at the location, Moise observed two officers fighting with a resisting Individual 1. They went to the ground with Individual 1 landing on his chest. Moise explained that Individual 1 was in a prone position, refusing to give his arms by putting them tightly under his chest. Moise approached to assist, standing at Individual 1's side. He directed him numerous times to give his hands but Individual 1 refused and continued to curse and shout. Moise testified that even after being cuffed, Individual 1 thrashed his body and tensed his legs so they did not move, as officers tried to lift him. He estimated that it took four officers to get Individual 1 to Moise's vehicle, which was the closest car (Tr. 56-58, 62-63).

As the officers tried to place Individual 1 in the backseat, Moise testified, he continued to be uncooperative, yelling, tensing his body and moving in a forward and backward motion. Ultimately, Moise had to push him into the vehicle by the shoulders. On direct examination, Moise explained that the standard practice, in a vehicle like theirs with no partition, was that an officer would sit behind the operator and a prisoner would be placed in the backseat on the passenger's side. That is, he would be placed away from the operator. Upon questioning by the Court, however, Moise said that "[t]he standard practice," compliant or not, "we always put them on the driver's side of the back." The Court followed up, however, by asking, "Okay. And why was it – is there any reason that you placed the prisoner behind the driver as opposed to

somewhere else?" Moise answered that, due to the way they parked the car after arriving at the call for assistance, Individual 1 was placed on the driver's side because "that was the side we had the opportunity to get the suspect in." In any event, Individual 1 continued to yell and curse after Moise shut the door. Moise testified he then heard Individual 1 "thrashing his head into the door panel." He estimated Individual 1 did this approximately three times. Moise recalled that Respondent "went towards the back seat and gained control of Individual 1." Moise explained that Respondent held Individual 1 by the chest to control him so he would not hit himself on the door panel. Respondent held Individual 1, who continued to yell and curse, as Moise drove to the precinct. Moise denied seeing Respondent hit or strike Individual 1 at any point (Tr. 64-69, 76-78).

Upon arriving at the precinct, Moise testified, he noticed injuries to Individual 1's face. He admitted that he did not recall seeing any blood on the vehicle's door panel. Moise notified the desk sergeant, who instructed that EMS be called. He recounted that Individual 1, who was belligerent in the cell area, refused to be seen by EMS. As such, Moise went back into the cells and, with other officers, took Individual 1 to the ground and handcuffed him, so that he could be transported to the hospital (Tr. 71-73, 76-77).

Respondent's version of events aligned with much of his partner's testimony. He stated that when they arrived at the scene, Tomassi and Istorico were next to an ice machine (see CCRB Ex. 5, photograph), trying to handcuff a resisting Individual 1 when they all fell to the ground. Respondent assisted by pulling Individual 1's legs, which allowed them to cuff him. Because the scene was chaotic, they opted to put him in Respondent's vehicle, which was closest. Like Moise, he recalled that Individual 1 remained "very agitated. Respondent explained, "He was cursing. He was still moving around even though he was handcuffed and he didn't want to go inside the RMP He stiffened his body. He didn't want to put his head inside the car" (Tr. 93-96, 102).

In the vehicle, Individual 1 continued to curse and yell. Respondent believed that he was going to spit on him. He testified that Individual 1 began banging the right side of his head on the panel of the door, doing this two or three times. Specifically, Respondent noted that Individual 1's head made contact with the "panel in the back" below the window, which was made of "hard plastic" and did not have any padding. He conceded that he did not hear Individual 1 cry out in pain. Explaining that Individual 1 was "moving forward," Respondent put his left hand on Individual 1's chest so that he would remain seated and to prevent him from moving to open the door or toward Moise in the driver's seat. Respondent denied striking Individual 1 while he was in the backseat or at any other point (Tr. 96-97, 101, 103-09, 111).

As they were taking Individual 1 out of the car, Respondent noticed that he was bleeding on the side of his head. Because Individual 1 was agitated and acting erratically in the holding cell, Respondent felt that it would be unsafe for EMS to see him without handcuffs, so he and Moise re-handcuffed him (Tr. 100).

There is no dispute that Individual 1 sustained facial injuries during the course of his arrest. The sole issue to be determined, as presented by the specification, is whether Respondent wrongfully used force by punching Individual 1 repeatedly in the face. For the reasons set forth below, the tribunal finds that the CCRB has proved this by a preponderance of the credible evidence.

In a case like this, where the accounts provided by the complainant and Respondent complete diverge as to how an injury was caused, resolution rests largely on determinations of witness credibility. In analyzing credibility, this tribunal may consider such factors as consistency of accounts over time, supporting or corroborating evidence, testimony upon cross examination and examination by the Court, motivation, bias or prejudice, and the degree to which an account comports with common sense and human experience.

Preliminarily, it must be noted that Individual 1 has filed a lawsuit against the City and thus has a potentially significant monetary interest in making it appear that he was grievously injured by a police officer. He also did not appear to testify at trial and was not subject to the scrutiny of cross examination, though his hearsay statements are admissible in this forum.

The tribunal also recognizes that Individual 1's statements over time lacked consistency. In his initial statements, he made no complaints about the first two officers on the scene who arrested him, even saying that they were doing their job and admitting he was resisting. In his subsequent 50-h hearing, however, Individual 1 changed his narrative, denying any resistance on his part and alleging that those officers had beaten him for four minutes and slammed him to the ground.

Individual 1 contended that he was continuously beaten in the backseat of the RMP for the duration of the ride to the precinct. During his conversation with a CCRB investigator a month after the incident, he estimated he was punched "over 100 [times] . . . From 50 to 100 times, repeatedly. . . . all over my face" (Ex. 3, pp. 28-29). He did not, however, suffer the kinds of injuries one would be expected to incur from being punched "nonstop" in the face for several minutes. There was no loss of consciousness mentioned in the first three interviews or the medical records. Upon arrival at the hospital, Individual 1 was described as "oriented to time, person and place." His gross vision, i.e. his general ability to see, was noted as intact, and a CT scan of his brain was negative for acute injuries. Individual 1's nasal bones were intact and there was no report of broken teeth or any injuries to the jaw. In sum, the medical evidence does not align with Individual 1's account of being punched 100 times. It is at best an exaggeration.

However, Respondent is charged with punching Individual 1 "repeatedly," not with punching him 100 or even 50 times. The injuries depicted in Individual 1's arrest photo, the larger bruise under his eye and the abrasions above his eyebrows, are consistent with multiple fist punches to the face. No witness reported observing any injuries to Individual 1 before he was placed in the police

vehicle. Even Estick, who had called the police due to Individual 1's conduct and had no motive to lie in support of Individual 1's claims, stated that Individual 1's face was "normal" just before he was placed in the vehicle. The lack of any observable injuries prior to being placed in the vehicle severely undercuts Respondent's counsel's contention that Individual 1 might have been injured while resisting arrest on the concrete sidewalk. Though the scene was chaotic and the bruising might have more fully developed later, it strains credulity that no one would have observed some swelling or markings on Individual 1's face if he had been injured prior to being placed in the vehicle.

The theory that Individual 1 might have injured himself by thrashing or banging his head into the rear door panel on the driver's side is weakened by Respondent and Moise's own testimony. It is not disputed that Moise and Respondent's vehicle lacked a partition. It was suggested by Moise that because Individual 1 was resisting, he was placed in this vehicle simply because it was the closest one relative to where he was handcuffed. Both Moise and Respondent indicated that Individual 1 was seated in the backseat behind the driver and subsequently banged his head multiple times against a hard plastic panel below the window. Indeed, because the orbital injury was to the left side, Individual 1 would have had to be seated behind the driver if he caused the injury by banging his head against the door.

If this is to be credited, Respondent and his partner violated Patrol Guide § 208-06, which provides that "[i]f the Department vehicle is not equipped with a fiberglass partition, the recorder will ride in the rear seat, directly behind the operator, with the prisoner seated on the passenger side of the vehicle." This is for the safety of the operator and everyone in the vehicle. Even a handcuffed prisoner could attempt to kick, spit at, or head-butt the driver or the driver's seat. Placing Individual 1 behind the driver would have been not only violative of the Patrol Guide but tactically unsafe for all involved. While it is certainly understandable that there was a rush to get a non-compliant and agitated prisoner into the nearest vehicle, it is for the same reason that any

reasonable officer would ensure that such a prisoner was as far from the operator as possible. In fact, it was stipulated that Tomassi and Istorico would have testified they did not place Individual 1 in their car because it lacked a partition (Tr. 86-88). This shows that safety was a consideration. Yet according to Respondent and Moise, Individual 1 was placed in very close proximity to the driver, directly behind him. The tribunal cannot accept that the officers willfully ignored this fundamental safety tactic and thereby placed themselves in potential jeopardy. As such, the entire narrative presented by Moise and Respondent becomes questionable.

Giving the Court further pause is the fact that Respondent testified that Individual 1 banged the right side of his face into the door panel when it is the left side of his face that sustained the much more serious injury. Moise also testified upon examination of the Court that the standard practice was to put the prisoner behind the operator. While it is certainly true that people often confuse left and right, particularly when trying to recount events to others, these discrepancies further undermine an already suspect version of events.

In sum, the credible evidence indicates that Individual 1 was not injured before he was placed in Respondent and Moise's vehicle. With regard to what transpired in the vehicle, Respondent presented a questionable narrative that would require the tribunal accepting that he violated the Patrol Guide and jeopardized his own safety with regard to Individual 1's placement in the vehicle. Given the implausible nature of this account, coupled with the fact that Individual 1's injuries are consistent with multiple punches to his face, the tribunal finds that the CCRB has met the burden of proving it was more likely than not that Respondent punched Individual 1 multiple times in the face. Accordingly, Respondent is found Guilty.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined.

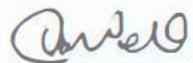
See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on January 9, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The CCRB requested that Respondent forfeit 20 vacation days. The prosecutor argued that such a penalty was justified by Respondent's CCRB history and the fact that Individual 1 was already in police custody when he was struck.

The Court agrees that striking Individual 1, who was already handcuffed and in the back seat of the police vehicle, was serious misconduct and did not serve any legitimate police objective. The Court does not, however, accept that Respondent's alleged prior history should be a factor in this penalty recommendation. Though it was claimed that Respondent has a history of CCRB complaints, there have been no disciplinary adjudications against Respondent. Respondent has no formal disciplinary history and has never been placed on force monitoring, as is generally directed when an officer receives three or more CCRB complaints in one year. In sum, there is nothing in Respondent's disciplinary history that suggests progressive discipline or an enhanced penalty is warranted.

It is the tribunal's position that a 15 vacation day penalty, akin to what other officers have forfeited in recent force cases involving handcuffed prisoners in police vehicles, adequately addresses Respondent's misconduct. See Case No. 2014-12476 (Feb. 16, 2016) (4-year police officer with no prior disciplinary record forfeited 15 vacation days for wrongfully striking handcuffed prisoner multiple times around his head, causing prisoner to sustain injuries, after prisoner spit on or near the officer). Accordingly, the Court recommends that Respondent receive a penalty of 15 vacation days.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED

MAR 28 2017



JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER EDUARDO PEREZ-ROMERO
TAX REGISTRY NO. 940571
DISCIPLINARY CASE NO. 2015-14319

Respondent was appointed to the Department on January 9, 2006. On his last annual three performance evaluations, he received a 4.5 overall rating of "Extremely Competent/Highly Competent" in 2015 and 4.0 overall ratings of "Highly Competent" in 2013 and 2014. He has five medals for Excellent Police Duty.

[REDACTED]

Respondent has no prior formal disciplinary history and no monitoring history.

For your consideration.

Respectfully submitted,


David S. Weisel
Assistant Deputy Commissioner Trials